

HOUSE BILL REPORT

HB 1149

As Reported by House Committee On:
Financial Institutions & Insurance

Title: An act relating to protecting consumers from breaches of security.

Brief Description: Protecting consumers from breaches of security.

Sponsors: Representatives Williams, Roach, Simpson, Kirby, Dunshee, Nelson and Ormsby.

Brief History:

Committee Activity:

Financial Institutions & Insurance: 1/22/09, 2/17/09 [DPS].

Brief Summary of Substitute Bill

- Creates retention standards for specific information involved in a credit or debit card transaction.
- Provides a cause of action for a financial institution against a person or service provider if the person or service provider has violated the retention standards and there is a breach of security affecting 5,000 or more unencrypted individual names or account numbers.

HOUSE COMMITTEE ON FINANCIAL INSTITUTIONS & INSURANCE

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 8 members: Representatives Kirby, Chair; Kelley, Vice Chair; Hurst, McCoy, Nelson, Roach, Santos and Simpson.

Minority Report: Do not pass. Signed by 2 members: Representatives Bailey, Ranking Minority Member; Parker, Assistant Ranking Minority Member.

Staff: Jon Hedegard (786-7127)

Background:

State Security Breach Law (chapter 19.255 RCW).

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

In 2005 the Legislature enacted a security breach law. The law requires any person or business to notify possibly affected persons when security is breached and unencrypted personal information is (or is reasonably believed to have been) acquired by an unauthorized person. A person or business is not required to disclose a technical breach that does not seem reasonably likely to subject customers to a risk of criminal activity.

"Personal information" is defined as an individual's first name or first initial and last name in combination with one or more of the following data elements, when either the name or the data elements are not encrypted:

- social security number;
- driver's license number or Washington identification card number; or
- account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account.

"Personal information" does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records.

The notice required must be either written, electronic, or substitute notice. If it is electronic, the notice provided is consistent with federal law provisions regarding electronic records, including consent, record retention, and types of disclosures. Substitute notice is only allowed if the cost of providing direct notice exceeds \$250,000; the number of persons to be notified exceeds 500,000; or there is insufficient contact information to reach the customer. Substitute notice consists of all of the following:

- electronic mail (e-mail) notice when the person or business has an e-mail address for the subject persons;
- conspicuous posting of the notice on the website page of the person or business, if the person or business maintains one; and
- notification to major statewide media.

A customer injured by a violation of the security breach law has the right to a civil action for damages.

State Disposal of Personal Information Law.

State law places restrictions on how certain types of personal information may be disposed. If a person or business is disposing of records containing personal financial and health information and personal identification numbers issued by a government entity, the person or business must take all reasonable steps to destroy, or arrange the destruction of, the information.

An individual injured by the failure of an entity to comply with the disposal or personal information law may sue for:

- \$200 or actual damages, whichever is greater, and costs and reasonable attorneys' fees if the failure to comply is due to negligence; or
- \$600 or three times actual damages (up to \$10,000), whichever is greater, and costs and reasonable attorneys' fees if the failure to comply is willful.

The Attorney General may bring a civil action in the name of the state for damages, injunctive relief, or both, against an entity that fails to comply with the law. The court may award damages that are the same as those awarded to individual plaintiffs.

Additional Federal and State Privacy Protections.

Federal and state health privacy laws generally include security provisions and safeguards for health information, including information relating to an individual's identity and payment information. These duties are imposed on health insurers, providers, and others in the health system.

Federal banking and insurance laws generally include security provisions and safeguards for individually identifiable health and financial information. These duties are placed on individuals and businesses in the banking community.

Payment Card Industry Security Standards Council.

The Payment Card Industry Security Standards Council (Council) is a limited liability corporation with the mission of enhancing payment account data security by fostering broad adoption of their standards for payment account security. The Council was established by American Express, Discover Financial Services, JCB, MasterCard Worldwide, and Visa International in 2004. The Council developed the Payment Card Industry Data Security Standards (PCI DSS). According to the Council, there were six principles and requirements in developing the requirements for security management, policies, procedures, network architecture, software design and other measures:

- build and maintain a secure network;
- protect cardholder data;
- maintain a vulnerability management program;
- implement strong access control measures;
- regularly monitor and test networks; and
- maintain an information security policy.

The Council does not enforce the PCI DSS. Individual payment systems establish contractual terms and penalties for noncompliance.

Summary of Substitute Bill:

No person that accepts an access device in connection with a transaction may retain the card security code data, the Personal Identification Number (PIN) verification code number, or access device account data other than the cardholder's name, primary account number, expiration date, and service code after the authorization of the transaction or, in the case of a PIN debit transaction, 48 hours after authorization of the transaction unless the information is encrypted. For a person conducting business as a transient accommodation or a rental car business, the 48 hour time frame begins after the termination of the transient accommodations transaction or rental agreement.

No service provider that processes access device transactions for or on behalf of a person who conducts business in Washington may retain the card security code data, the PIN

verification code number, or access device account data other than the cardholder's name, primary account number, expiration date, and service code after the settlement of the transaction or, in the case of a PIN debit transaction, 48 hours after authorization of the transaction.

Remedies.

A person or entity or service provider must reimburse a financial institution if there is a breach of the security of the system of a person or entity or service provider and the:

- person or entity or service provider has violated the card retention provisions in the bill; and
- breach compromises 5,000 or more unencrypted individual names or account numbers.

The reimbursement is for a financial institution that issued any access devices affected by the breach for all actions reasonably undertaken in order to protect consumers, including costs for:

- the cancellation or reissuance of an access device affected by the breach;
- the closing of a deposit, transaction, checking, share draft, or other account affected by the breach and any action to stop payment or block a transaction with respect to the account;
- the opening or reopening of a deposit, transaction, checking, share draft, or other account affected by the breach;
- the notification of account holders affected by the breach;
- credit monitoring services on accounts affected by the breach for a period of one year from the time the issuer of the access device is notified of the breach; and
- reasonable attorneys' fees and costs associated with the action.

The remedies are cumulative and do not restrict any other right or remedy otherwise available to the financial institution.

Limited Immunity.

A financial institution that provided or approved equipment used to process payment transactions is precluded from recovering costs if:

- the breach of the security of the system is directly related to the equipment provided or approved by the financial institution; and
- the equipment was being used in the manner recommended by the financial institution.

Additional Transaction Fees Permitted.

A person or entity accepting an access device in connection with a transaction may add an additional 2 cents per transaction to the balance of the transaction for the purpose of subsidizing costs associated with insurance designed to protect against liability associated with the costs of a breach.

Arbitration.

The parties to a dispute arising under the security breach provisions may agree to submit to arbitration. The arbitrator must be agreed upon by the parties at the time the dispute arises. The arbitration process comply with the requirements of chapter 7.04A RCW relating to

arbitration. A party to a dispute entering into arbitration as an initial method of dispute resolution may seek also a refund or credit made to an account holder to cover the cost of any unauthorized transaction related to the breach, except that costs may not include any amounts recovered by the financial institution from a credit card company. Any other remedy provided by law may also be sought by a party.

Substitute Bill Compared to Original Bill:

The substitute bill:

- removes the section that altered notification provisions in the existing security breach law;
- replaces the defined phrase “magnetic stripe data” with “access device account data” throughout the bill and the reference to magnetic strip was removed from the definition;
- prohibits a person or service provider from retaining certain financial information unless the information is encrypted;
- provides for liability of a person or a service provider who has violated the retention provisions and there is a breach of the security of the system;
- eliminates liability of a person whose service provider has violated the retention provisions and there is a breach of the security of the system; and
- alters the application of debit card time-lines as they apply to transient accommodations and rental car businesses.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Substitute Bill: The bill takes effect on January 1, 2010.

Staff Summary of Public Testimony:

(In support) Washington was one of the first states to pass a security breach law to protect consumers. The breaches that are in the news have occurred since this law passed. Prior to the law, there was no requirement for the disclosure of a breach. A security breach has costs. There are costs in notifying customers, closing existing accounts, opening new accounts, and issuing new cards. Credit unions began by always issuing new cards. Now, the frequency of breaches and the cost involved makes issuing new cards prohibitively expensive. A single breach may impact tens of millions of cardholders. Currently, a financial institution cannot recover those costs. The bill would allow recovery and enable the institution to take all measures to protect customers. This bill is similar to a law adopted in Minnesota in 2007. A suit is only possible if someone improperly retains specific unencrypted financial information without the customers' consent and there is a breach that impacts the information of at least 5,000 persons. This is designed to let financial institutions recover costs and create incentives for businesses to provide additional consumer protections before identity theft can occur. The first section in the bill has some issues; that section can be removed and the goals of the legislation can still be accomplished. There are costs in protecting the information of

credit union members. A new card takes seven to 10 days to process. During that time, a customer has to figure out other ways to make financial transactions. Credit unions will do everything possible to protect customers, but that comes at the price of time and money.

(In support with concerns) There are some issues of concern. There were some issues with the first section of the bill but we understand that those are going to be addressed. We do not yet support or oppose the bill. Data protection is a very important issue. Data theft is a global problem. It often involves organized crime.

(Opposed) The current state of the law is appropriate. A new cause of action is not needed. There are already agreements in place to address this issue. The economy already is raising difficulties for retailers. This shifts the costs to retailers. This additional liability might put some retailers out of business. Retailers already pay excessive interchange fees which should cover any costs. Credit card companies already have standards and contracts in place to account for these issues.

Persons Testifying: (In support) Representative Williams, prime sponsor; Stacy Augustine, Washington Credit Union League; Debie Keese, Spokane Media Credit Union; and Bruce Cramer, OBB Credit Union.

(In support with concerns) Lew McMurrin, Washington Technology Industry Association.

(Opposed) Michael Transue, Washington Restaurant Association; and Mark Johnson, Washington Retail Association.

Persons Signed In To Testify But Not Testifying: None.